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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ROY LEE WALKER, Defendant and Appellant.	A157758 (Alameda County Super. Ct. No. 137327)

Defendant Roy Lee Walker appeals the denial of his petition for resentencing pursuant to Penal Code[1] section 1170.95, which provides for resentencing of individuals convicted of felony murder or murder under a natural and probable consequences theory if they can no longer be convicted of murder under January 1, 2019 amendments to the Penal Code. Walker contends the trial court erred in failing to appoint him counsel and ordering briefing before reviewing his petition. Because the record discloses that Walker was ineligible for relief as a matter of law, even if we assume that the trial court erred in not appointing him counsel, any such error was harmless. We therefore affirm the order of denial.

[1] All further statutory references are to the Penal Code unless otherwise specified.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1999, Walker was charged with the murder of Barry Bell (§ 187), with a special circumstance allegation that Walker committed the murder by means of lying in wait (§ 190.2, subd. (a)(15)). Walker was also charged with possession for sale of a cocaine-based controlled substance (Health & Saf. Code, § 11351.5) and personal use and discharge of a firearm (§§ 1203.06, 12022.53, subd. (c)). (*Walker*, *supra*, A106926.) To find true the special circumstance of lying in wait, the jury was instructed that the People must prove beyond a reasonable doubt that defendant was either the actual killer or, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted another in commission of murder in the first degree. (See *Walker*, A106926.)

The jury convicted Walker of first degree murder and possession of cocaine for sale, and found true the lying-in-wait special circumstance as well as the firearm enhancement. (*Walker*, *supra*, A106926.) Walker was sentenced to life without the possibility of parole for the murder conviction, a consecutive 20-year term for the firearm use enhancement, and a concurrent four-year term for the possession for sale conviction. (*Ibid.*) In 2005, this Court affirmed the judgment. (*Ibid*.)

In 2018, the Legislature enacted Senate Bill. No. 1437 (2017–2018 Reg. Sess.) (Senate Bill 1437), which took effect on January 1, 2019. (Stats. 2018, ch. 1015.) Among other changes, Senate Bill 1437 amended section 189 to limit liability for murder under a felony murder or natural and probable consequences theory to a person who is the actual killer, who "with the intent to kill" aids and abets the actual killer, or who is a major participant in the

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[2] The evidence presented at trial is set forth in our opinion in *People v. Walker* (Sept. 29, 2005, A106926 [nonpub. opn.]) (*Walker*).

underlying felony and acted with reckless indifference to human life. (Stats. 2018, ch. 1015, §§ 1(f), § 3(e); see § 189, subd. (e).) Senate Bill 1437 permits an individual convicted of murder under these theories to petition the sentencing court to vacate the conviction and to be resentenced on any remaining counts under certain enumerated procedures. (Stats. 2018, ch. 1015, § 4; see § 1170.95.)

In April 2019, Walker petitioned for sentencing relief under section 1170.95. In a form petition, Walker averred that he was convicted of first or second degree murder pursuant to the felony murder rule or the natural and probable consequences doctrine and that he could not now be convicted of first or second degree murder because of the amendments to Penal Code sections 188 and 189. He further declared: "I was not the actual killer"; "I did not, with the intent to kill, aid, abet, counsel, command, induce, solicit, request, or assist the actual killer in the commission of murder in the first degree"; and "I was not a major participant in the felony **or** I did not act with reckless indifference to human life during the course of the crime or felony." Walker also requested the appointment of counsel.

After taking judicial notice of Walker's record of conviction, including the appellate opinion in *Walker*, *supra*, A106926, the trial court denied the petition without appointing counsel or ordering briefing. The court concluded that Walker is ineligible for resentencing as a matter of law because the jury had found that Walker "was either the actual killer or, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murders in the first degree." The court thus determined that Walker "was convicted on a valid theory of murder which survives the changes to sections 188 and 189 made by SB 1437." This appeal followed.

II. DISCUSSION

A. *Senate Bill 1437 and Section 1170.95*

To be convicted of murder, a jury must ordinarily find that the defendant acted with " 'malice aforethought.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181, quoting § 187, subd. (a).) The felony murder rule provided an exception that makes "a killing while committing certain felonies murder without the necessity of further examining the defendant's mental state." (*Chun*, at p. 1182.) Under a separate rule known as the natural and probable consequences doctrine, a " ' "person who knowingly aids and abets criminal conduct is guilty of not only the intended crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime." ' " (*People v. Chiu* (2014) 59 Cal.4th 155, 161.)

Senate Bill 1437 "was enacted 'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.' " (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1135 (*Lewis*), review granted Mar. 18, 2020, S260598,[3] quoting Stats. 2018, ch. 1015, § 1(f).) To effectuate this purpose, Senate Bill 1437 amended the definition of malice in section 188 to provide that "[m]alice shall not be imputed to a person based solely on his

[3] On March 18, 2020, the Supreme Court granted review on the following questions that directly bear on Walker's appeal: "(1) May superior courts consider the record of conviction in determining whether a defendant has made a prima facie showing of eligibility for relief under Penal Code section 1170.95? (2) When does the right to appointed counsel arise under Penal Code section 1170.95, subdivision (c)." (*Lewis*, *supra*, S260598.)

or her participation in a crime." (§ 188, subd. (a)(3); *People v. Verdugo* (2020) 44 Cal.App.5th 320, 326 (*Verdugo*), review granted Mar. 18, 2020, S260493.) As a result of these amendments, the natural and probable consequences doctrine can no longer be used to support a murder conviction. (See *People v. Lopez* (2019) 38 Cal.App.5th 1087, 1103 & fn. 9, review granted Nov. 13, 2019, S258175); Stats. 2018, ch. 1015, §§ 1(f), 1(g).)

As noted above, Senate Bill 1437 amended section 189 to limit liability for murder under a felony murder theory to a person who (1) was the actual killer; (2) though not the actual killer, acted "with intent to kill" and "aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer" in the commission of first degree murder; or (3) was "a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); *Verdugo*, *supra*, 44 Cal.App.5th at p. 326.)

Senate Bill 1437 did not "alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.' " (*Lewis*, *supra*, 43 Cal.App.5th at p. 1135.) Accordingly, "[o]ne who directly aids and abets another who commits murder is thus liable for murder under the new law just as he or she was liable under the old law." (*Ibid.*)

Section 1170.95 provides that "[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts." (§ 1170.95, subd. (a).) A petition may be filed when the following three conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory

of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subds. (a)(1)–(a)(3).)

The petitioner must declare that he or she is eligible for relief based on the requirements above, provide the case number and year of conviction, and specify whether the petitioner requests the appointment of counsel. (§ 1170.95, subd. (b)(1).) "If any of the information required by this subdivision is missing from the petition and cannot be readily ascertained by the court, the court may deny the petition without prejudice to the filing of another petition and advise the petitioner that the matter cannot be considered without the missing information." (§ 1170.95, subd. (b)(2).)

Section 1179,95, subdivision (c) sets forth the trial court's obligations upon the submission of a complete petition: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. . . . If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." Once the order to show cause issues, the court must hold a hearing to determine whether to vacate the murder conviction and to recall

the sentence and resentence the petitioner on any remaining counts. (§ 1170.95, subd. (d)(1).)

B. *The Court Correctly Concluded that Walker Is Ineligible for Resentencing Under Section 1170.95*

Walker contends that the trial court erred in summarily denying his petition for resentencing without appointing counsel on his behalf or ordering briefing from the parties. In essence, he claims that a facially valid petition under section 1170.95 requires the trial court to appoint counsel if requested and to order briefing before it can determine whether the petitioner has established a prima facie basis for relief. He maintains that the trial court may not look beyond the face of the petition at this stage of inquiry.

Recent appellate court decisions have rejected similar contentions that section 1170.95, subdivision (c) mandates the appointment of counsel and briefing whenever, as here, a facially sufficient petition has been filed. (See *Lewis*, *supra*, 43 Cal.App.5th at pp. 1139–1140; *Verdugo*, *supra*, 44 Cal.App.5th at pp. 323, 328, 332–333; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), review granted Mar. 18, 2020, S260410.) For example, the *Verdugo* court determined that subdivisions (b) and (c) of section 1170.95 together prescribe a "three-step evaluation" process before determining if an order to show cause should issue. (See *Verdugo*, *supra*, 55 Cal.App.5th at pp. 332–333.) It explained that upon the filing of a section 1170.95 petition, the trial court first screens the petition to determine if it contains the basic averments required by subdivision (b)(1)(A) and (B). (See *Verdugo*, at pp. 323, 327–328.) The court may deny the petition at this stage without prejudice to refiling if the petition lacks required elements or is facially inadequate. (§ 1170.95, subd. (b)(2); *Verdugo*, at p. 328.) "This initial

review thus determines the facial sufficiency of the petition." (*Verdugo*, at p. 328.)

The *Verdugo* court further explained, "Subdivision (c) then prescribes two additional court reviews before an order to show cause may issue, one made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 55 Cal.App.5th at p. 328.) The initial prima facie review is "to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Verdugo*, at p. 329.) At this stage of review, the trial court may rely upon the petitioner's record of conviction, including the charging documents, jury instructions, verdict forms, and appellate decision, to conclusively establish ineligibility for relief. (See § 1170.95, subd. (a)(1)-(2); *Verdugo*, at p. 333; *Lewis*, *supra*, 43 Cal.App.5th at pp. 1137–1138.)

"[I]f the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 330; see § 1170.95, subd. (c).) After the second review, if the trial court concludes that the petitioner has established a prima facie basis of eligibility for resentencing, it must issue an order to show cause. (*Verdugo*, at p. 328; *Lewis*, *supra*, 43 Cal.App.5th at p. 1140.)

As noted above, Walker disagrees with the *Verdugo* court's formulation of a two-step prima facie review process and contends he was entitled to appointed counsel when he filed a facially sufficient petition. The issue of when the right to appointed counsel arises under section 1170.95, subdivision (c) is currently before the Supreme Court in *Lewis*, *supra*, S260598, *Verdugo*, *supra*, S260493, and *Cornelius*, *supra*, S260410.

We need not resolve this question, however, because even if section 1170.95, subdivision (c) required the trial court to appoint counsel upon the presentation of a facially valid petition, any such error in failing to do so was harmless. That is because the record conclusively establishes that he is ineligible for relief as a matter of law.

It is undisputed that a jury convicted Walker of first degree murder (§ 187, subd. (a)) while lying in wait (§ 190.2, subd. (a)(15)), and this court affirmed the judgment of conviction (*Walker*, *supra*, A106926). Because the jury found true the lying-in-wait special circumstance, there is no possibility that Walker was convicted of felony murder or murder under a natural and probable consequences theory. (See *People v. Ruiz* (1988) 44 Cal.3d 589, 614 ["Proof of lying-in-wait . . . acts as the functional equivalent of proof of premeditation, deliberation and intent to kill"]; see also *People v. Epps* (1986) 182 Cal.App.3d 1102, 1122 ["Ordinary first degree murder, which requires premeditation and deliberation with malice aforethought, and felony murder are not the same crimes because malice is not an element of felony murder"].) Indeed, Walker concedes "that the [appellate] opinion supports the trial court's conclusion the jury found he was either the actual killer or aided and abetted the killing with the intent to kill, either of which would make him ineligible for 1170.95 relief." (See *Walker*, *supra*, A106926.)

Thus, even with the benefit of counsel, Walker would not be able to refute the trial court's conclusion that he "was convicted of a valid theory of murder which survives the changes to sections 188 and 189." Accordingly, Walker suffered no prejudice by the trial court's failure to appoint counsel and it would be futile to remand the case for the appointment of an attorney on this record.

III. DISPOSITION

The order denying the petition is affirmed.

Sanchez, J.

WE CONCUR:

Humes, P.J.

Margulies, J.

8A157758 People v. Walker